



FH
[REDACTED]

**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

Milwaukee Enrollment Services, Petitioner

DECISION

v.

FOF/167363

[REDACTED] Respondent

PRELIMINARY RECITALS

Pursuant to a petition filed July 17, 2015, under Wis. Admin. Code §HA 3.03, and see, 7 C.F.R. § 273.16, to review a decision by the Milwaukee Enrollment Services to disqualify [REDACTED] from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on September 03, 2015, at Milwaukee, Wisconsin.

The issue for determination is whether the respondent committed an Intentional Program Violation(IPV).

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

Department of Health Services
Division of Health Care Access and Accountability
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Pamela Hazley, HSPP Sr.
Milwaukee Enrollment Services
1220 W Vliet St, Room 106
Milwaukee, WI 53205

Respondent:

[REDACTED]
[REDACTED]
[REDACTED]

ADMINISTRATIVE LAW JUDGE:

Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County who received FoodShare benefits from March 28, 2014 through March 6, 2015. (Exhibit 4)

2. On September 16, 2013, Milwaukee Enrollment Services (the agency) sent the Respondent an Eligibility and Benefits booklet, advising him of the penalties for providing false information, including disqualification from the FoodShare program. (Exhibits 15 and 16)
3. On February 10, 2014, the agency sent the Respondent a notice that he had a review due in 45 days; on March 19, 2014 the agency sent the Respondent notice that his case closed. (Exhibit 15)
4. On March 28, 2014, an individual claiming to be the Respondent called the agency to complete a renewal. At that time, the individual indicated that he did not have any income. The individual electronically/telephonically signed the renewal indicating that the information was correct and complete. (Exhibits 5 and 7)
5. On August 11, 2014, the agency sent the Respondent notice that he had a review due in 45 days; on September 17, 2015, the agency sent the Respondent notice that his case closed. (Exhibit 15)
6. On September 22, 2014, an individual claiming to be the Respondent called the agency and completed another renewal and again reported no income. The individual electronically/telephonically signed the renewal, indicating that the information was correct and complete. (Exhibits 5 and 9)
7. On September 23, 2014, the agency sent the Respondent another Eligibility and Benefits booklet, which again warned the Respondent about the penalties for providing false information. (Exhibits 15 and 16)
8. On February 9, 2015, the agency sent the Respondent a notice that a review was due in 45 days; on March 18, 2015, the agency sent the Respondent a notice that his FoodShare case was closed. (Exhibit 15)
9. On March 30, 2015, an individual claiming to be the Respondent called the agency to complete a renewal, still reporting no income. The individual electronically signed the renewal indicating the information was correct and complete. (Exhibits 5 and 11)
10. All three renewals indicated the Respondent was homeless, but had a mailing address on 58th Street. (Exhibits 7, 9 and 11)
11. The Respondent was employed at an electronics store from January 2014 through June 2015 and that he received paychecks every two weeks, without fail, beginning January 28, 2014. The Respondent reported the same address on 58th street to his employer. (Exhibits 6 and 14)
12. The EBT card assigned to the Respondent ends in [REDACTED]. That card has been used exclusively in Arizona during the time in question. (Exhibits 13 and 18)
13. The Respondent has an authorized buyer, [REDACTED], who has an assigned EBT card ending in [REDACTED]. That card does not appear to have been used at all. (Exhibit 13 and 18)
14. On July 21, 2015, the agency sent the Respondent an Administrative Disqualification Hearing Notice, alleging that the Respondent intentionally withheld information about his income from April 2014 through March 2015. (Exhibit 2)

DISCUSSION

Respondent's Non-appearance

The Respondent did not appear for this hearing. This circumstance is governed by the regulation in 7 C.F.R. §273.16(e)(4), which states in part:

If the household member or its representative cannot be located or fails to appear at a hearing initiated by the State agency without good cause, the hearing shall be conducted without the household member being represented. *Even though the household member is*

not represented, the hearing official is required to carefully consider the evidence and determine if intentional Program violation was committed based on clear and convincing evidence. If the household member is found to have committed an intentional program violation but a hearing official later determines that the household member or representative had good cause for not appearing, the previous decision shall no longer remain valid and the State agency shall conduct a new hearing. The hearing official who originally ruled on the case may conduct a new hearing. In instances where the good cause for failure to appear is based upon a showing of nonreceipt of the hearing notice, the household member has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. In all other instances, the household member has 10 days from the date of the scheduled hearing to present reasons indicating a good cause for failure to appear. A hearing official must enter the good cause decision into the record.

Emphasis added

The hearing in this case took place on September 3, 2015. The Respondent was advised of the date and time of the hearing, in an Administrative Disqualification Hearing Notice that was sent to him at his last known address in Milwaukee, Wisconsin.

Ms. Hazley testified that there is no record of any returned mail. The Respondent did not appear at the hearing and the Respondent did not contact the Division of Hearings and Appeals within 10 days to explain his failure to appear. As such, it is found that the Respondent did not have good cause for his non-appearance.

What is an Intentional Program Violation?

7 C.F.R. §273.16(c) states that Intentional Program Violations “shall consist of having intentionally: 1) Made a false or misleading statement or misrepresented facts; or 2) Committed an act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any State statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of coupons, authorization card or any other reusable documents used as part of an automated delivery system (access device).”

The Department’s written policy restates federal law, below:

3.14.1 IPV Disqualification

7 CFR 273.16

A person commits an Intentional Program Violation (IPV) when s/he intentionally:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

An IPV may be determined by the following means:

1. Federal, state, or local court order,
2. Administrative Disqualification Hearing (ADH) decision,
3. Pre-charge or pretrial diversion agreement initiated by a local district attorney and signed by the FoodShare recipient in accordance with federal requirements, or
4. Waiver of the right to an ADH signed by the FoodShare recipient in accordance with federal requirements.

FoodShare Wisconsin Handbook, §3.14.1.

The agency may disqualify only the individual who either has been found to have committed the IPV or has signed a waiver or consent agreement, and not the entire household. If disqualified, an individual will be ineligible to participate in the FS program for one year for the first violation, two years for the second violation, and permanently for the third violation. However, any remaining household members must agree to make restitution within 30 days of the date of mailing a written demand letter, or their monthly allotment will be reduced. 7 C.F.R. §273.16(b).

What is the Agency's burden of Proof?

In order for the agency to establish that a FoodShare recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit an intentional program violation per 7 C.F.R. §273.16(e)(6).

"Clear and convincing evidence" is an intermediate standard of proof which is more than the "preponderance of the evidence"(a.k.a. "more likely than not") used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases.

In Kuehn v. Kuehn, 11 Wis.2d 15, 26 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that "yes" should be the answer because of its greater weight and clear convincing power. "Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the "middle burden." The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that "it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable." 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may exist a reasonable doubt that the elements have been shown.

The Merits of the Agency's Case

In the case at hand, the agency asserts that the Respondent violated the rules of the FoodShare Program by lying about his income from April 2014 through March 2015.

It is clear from the State Wage Record and Work Number Print Out that the Respondent was working for an electronics store during the time in question. (Exhibits 6 and 14)

It is clear from the phone renewals that an individual claiming to be the Respondent has called in and applied for benefits, claiming not to have any income.

What is not clear, is whether the Respondent was the individual phoning in the renewals.

The EBT card assigned to the Respondent has been used exclusively in Arizona. It is highly unlikely that the Respondent is living and working in Milwaukee, but doing all of his grocery shopping in Arizona. So, someone else is using up the FoodShare benefits.

It doesn't make much sense for the Respondent to apply for FoodShare benefits that he is not using. It is possible that the Respondent is acting in collusion with a third party to defraud the FoodShare program, i.e. applying for benefits but letting someone else use them, but there is insufficient evidence in the record to support that suspicion.

Some consideration was given to the fact that the notices regarding the benefits were sent to Respondent's address. Indeed, one would think he would call the agency and question a letter telling him that he was approved for benefits, but looking at the Correspondence History Search Results print-off (Exhibit 15), there is a pattern in which reviews are missed, the case gets closed and then someone calls in to do the reviews. This suggests the possibility that the Respondent is disregarding the notices mailed to his home and whomever is using the benefits, is timing the renewals. I note that the Transaction Summary suggests that the person in Arizona knows when benefits are loaded onto the EBT card, because some balance inquiries were done on or within a few days of the six of the month, when DHS issued the benefits. (See Exhibits 4 and 18)

Without more information/evidence, there is no way to know exactly what was going on, what the Respondent knew or what actions the Respondent took, if any.

Based upon the foregoing, it is found that the agency has not met its burden to prove, by clear and convincing evidence, that the Respondent intentionally violated the rules of the FoodShare program by failing to report his income.

CONCLUSIONS OF LAW

The agency has not met its burden to prove, by clear and convincing evidence, that the Respondent intentionally violated the rules of the FoodShare program by failing to report his income.

THEREFORE, it is

ORDERED

That the IPV for case number [REDACTED] is hereby reversed.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to

claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

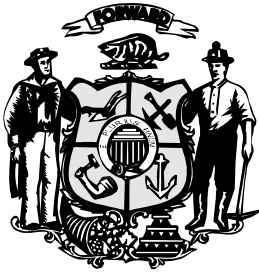
APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,
Wisconsin, this 25th day of September, 2015.

\sMayumi M. Ishii
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on September 25, 2015.

Milwaukee Enrollment Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
Pamela.Hazley@dhs.wisconsin.gov